LIBRARY
SUPREME COURT, U. S.

FILED

No. 72-1854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; and A. ROBERT SCHAEVERS,
Petitioners,
v.
LLOYD W. MCCORKLE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONERS

MILTON A. SMITH
General Counsel

OTTO F. WENZLER
Labor Relations Counsel
Chamber of Commerce of the United States of America
1615 H Street, N.W.
Washington, D.C. 20006

GERARD C. SMETANA
225 South Hermon Avenue
Chicago, Illinois 60607

JERRY KROPKOWSKI
BOROVSKY, EHRLICH & KROPKOWSKI
120 South La Salle Street
Chicago, Illinois 60603

Of Counsel:

CRUZ, ZULUETA & RAYMUNDO
2011 Eye Street, N.W.
Washington, D.C.

WILSON - EPES PRINTING CO., INC. - 737-8000 - WASHINGTON, D.C. 20001

INDEX

Interest of the Chamber of Commerce 1

Reasons for Granting the Writ 2

I. The Nature of the Problem 2

II. Courts' Treatment of the Mootness Issue Has Been Inconsistent and Affords No Effective Guidance to Potential Litigants 5

A. The Differing Variables Employed by the Courts 5

B. Discussion of the Variables Courts Have Employed in Mootness Cases and an Alternative Proposal 13

III. There Exists An Irreconcilable Conflict Among the Circuits as Well as Between the Circuits and This Court's Decisions 21

Conclusion 25

AUTHORITIES CITED

Cases:	Page
Almacs v. *Hackett*, 311 F. Supp. 964 (D.R.I., 1970)	20
Association of Data Processing Service Organizations, Inc. v. *Camp*, 397 U.S. 150	24
Bakery Sales Drivers Union v. *Wagshal*, 333 U.S. 437, 422 (1948)	6, 21
Barlow v. *Collins*, 397 U.S. 159	24
Boggess v. *Berry Corp.*, 233 F. 2d 389, 391 (CA 9, 1956)	14
Brockington v. *Rhodes*, 396 U.S. 41 (1969)	9, 10
Campbell Soup Co. v. *Martin*, 202 F. 2d 398, 399, (CA 5, 1953)	14
Carroll v. *President & Commissioners of Princess Anne County*, 394 U.S. 175 (1968)	16
Commercial Cable Co. v. *Burleson*, 250 U.S. 360 (1919)	7
Dow Chemical Co. v. *Taylor*, —— F. Supp. ——, 57 F.R.D. 105 (1972)	20
Dyer v. *SEC*, 266 F. 2d 33, 47 (CA 8), cert. denied, 361 U.S. 835 (1959)	14
Ex Parte Baez, 177 U.S. 378 (1900)	17
Flast v. *Cohen*, 392 U.S. 83, 95 (1968)	4, 18, 19
Francis v. *Davidson*, 340 F. Supp. 351 (D. Mich.), aff'd per curiam, 409 U.S. 904 (1972)	20
Friend v. *United States*, 388 F. 2d 579, 581 (CA DC, 1967)	14
Gray v. *Sanders*, 372 U.S. 368 (1968)	8, 10
Grinell v. *Hackett*, —— F. 2d ——, 82 LRRM 2986 (1973)	15, 20
Hall v. *Beals*, 396 U.S. 45 (1969)	9, 10
ITT v. *Minter*, 435 F. 2d 989 (CA 1, 1970)	20
Local 1976, United Brotherhood of Carpenters and Joiners, et al. v. *N.L.R.B.*, 357 U.S. 93	21
A. L. Mechling Barge Lines v. *United States*, 368 U.S. 324 (1961)	7
Moore v. *Ogilvie*, 394 U.S. 814 (1969)	9, 10, 11, 12, 13, 14, 18

AUTHORITIES CITED—Continued

Page

N.L.R.B. v. *Globe Wernicke Systems Co.*, 336 F. 2d 589 (CA 6, 1964) 22
N.L.R.B. v. *Local 65, Carpenters Union*, 318 F. 2d 419 (CA 3, 1963) 22
N.L.R.B. v. *Local 182, IBT*, 314 F. 2d 53 (CA 2, 1963) 22
N.L.R.B. v. *March Supermarkets, Inc.*, 327 F. 2d 109 (CA 7, 1963) 22
N.L.R.B. v. *Mexia Mills, Inc.*, 339 U.S. 563, 567 (1950) 6, 21
N.L.R.B. v. *Plumbers Union of Nassau County, Local 457, et al.*, 299 F. 2d 497 (CA 2, 1962) 22
N.L.R.B. v. *Raytheon Co.*, 398 U.S. 25 (1970) 6, 21
N.L.R.B. v. *United Hatters, et al.*, 286 F. 2d 950 (CA 4, 1961) 22
Oil Workers, Local 8-6 v. *Missouri*, 361 U.S. 363 (1960) 6, 7, 8, 9, 10, 11, 12, 13, 17, 19, 21
Pittsburgh Newspaper Printing Pressmen's Union No. 9 v. *Pittsburgh Press Co., et al.*, —— F. 2d ——, 83 LRRM 2349 (decided May 29, 1973) 23
Russo v. *Kirby*, 453 F. 2d 548 (CA 7, 1971) 20
Samoff v. *IAM, Lodge No. 1*, 420 F. 2d 952 (CA 3, 1969) 23
Sibron v. *New York*, 392 U.S. 40 (1968) 11, 12, 13, 14, 18
Singer Mfg. Co. v. *Wright*, 414 U.S. 696 (1968) 17
Southern Pacific Terminal Co. v. *ICC*, 219 U.S. 498 (1911) 10, 11, 12, 14, 18
Street Employees Div. 988 v. *Wisconsin Employment Relations Board*, 340 U.S. 416, 418 (1951) 14
Street Employees Div. 1287 v. *Missouri*, 374 U.S. 74 (1963) 7
Terminal Freight Cooperative Assn. et al. v. *Solein*, 440 F. 2d 124 (CA 8, 1971) 23
United States v. *W. T. Grant Co.*, 345 U.S. 629, 623 (1953) 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, 17, 24

AUTHORITIES CITED—Continued

	Page
United States v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897)	17, 18
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579, 594 (1952)	4
Miscellaneous:	
Sidney A. Diamond, Federal Jurisdiction to Decide Moot Cases, 94 U. Pa. L, Rev. 125 (1946)	3, 11
Jaffe, The Citizen As Litigant In Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. Rev. 1033 (1968)	16
"Moot" Administrative Orders, 53 Harv. L. Rev. 628, 630 (1940	15
Note, Cases Moot on Appeal: A Limit on the Judicial Power, 103 U. Pa. L. Rev. 772 (1955)	3, 8
Note, Moot Cases on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672 (1970)	3, 8, 12, 20, 24
United States Constitution, Article III, Section 2	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; and A. ROBERT SCHAEVITZ,
Petitioners,

v.

LLOYD W. MCCORKLE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONERS*

INTEREST OF THE CHAMBER OF COMMERCE

The interest of the Chamber of Commerce is set forth at pp. 1-3 of the accompanying "Motion of the Chamber of Commerce of the United States for Leave to Intervene."

---

* On June 8, 1973, the Chamber filed a motion for leave to intervene in this proceeding. Consent to its intervention was received from all parties to this case with the exception of Teamsters Local Union No. 676, which interposed no objection to the Chamber's motion. Should the Chamber's motion for leave to intervene not be granted, the Chamber's brief should alternatively be considered as a brief *amicus curiae* since, pursuant to Rule 42, consent from all parties to this case has been obtained for the filing of a brief *amicus curiae*.

REASONS FOR GRANTING THE WRIT

The instant case presents an issue of enormous importance for the efficient functioning of the judicial system. It is, moreover, an issue as to which no prospective litigant and no court has been afforded meaningful or reliable guidance. On the contrary, the question whether a case has become moot,—a question which can arise to plague any party in any case at any time with respect to any issue,—has produced a wide range of differing views, differing tests and differing results. Predictably, there has resulted a conflict in the circuits which cannot rationally be reconciled. Indeed, both the conflict and the confusion are so clear, that the court below expressly urged this Court to address itself to the problem. Accordingly, this Court's guidance in the formulation of appropriate rules is needed and warranted. This need is particularly urgent in the area of labor relations with which the instant case is concerned because of the unusual degree of inconsistency and conflict afflicting mootness decisions in this field.

I. The Nature of the Problem

The narrow question presented here is whether a case arising under the labor laws becomes moot and should not therefore further engage the judicial process when the immediate dispute which gave rise to it, although of a recurring nature involving matters of public importance, becomes resolved during the process of review.

In resolving this question, the generally cited bases for the mootness doctrine itself afford only limited assistance. In its broadest sense, mootness is one of the doctrines by which a court determines whether or not a matter before it may be properly adjudicated. It is a limitation on judicial power. Justiciability, an ill-defined concept relied upon to determine the scope and limitations of the judicial power, is often thought of as a Consti-

tional stricture imposed by the "case" or "controversy" requirement.[1] However, the terms "case" or "controversy" are themselves vague and inherently capable of varying interpretation,[2] so that to say that a matter is not justiciable because it does not present a "case" or "controversy" is devoid of useful meaning. It is perhaps for this reason that mootness problems, which arise because the conduct complained of has ceased prior to appeal but is likely to recur, have posed a conceptual difficulty that has failed to evoke a consistent or predictable response.[3]

Aside from imprecise Constitutional limits, the *policy* bases for the mootness doctrine similarly offer limited assistance. Those bases have been described as a need to economize judicial endeavor and need to assure the fullest litigation of the issues,—an objective presumably best guaranteed by an existing "controversy."[4] In fact, both criteria are suspect. If an issue is of a recurring nature whose potential effect reaches many prospective plaintiffs or defendants, the greatest judicial economy will result from a decision which will put the issue to rest and obviate much future litigation. If the nature of the recurring issue involved is one which is inherently likely to be resolved prior to a reviewing court's decision on the merits, then a failure to decide it despite such a resolution will only result in proliferating litigation in which each case in turn is likely to become "moot" while the underlying dispute continues to avoid judicial scrutiny. Such a result produces the antithesis of "judicial econ-

---

[1] U.S. Const., Art. III, Sec. 2.

[2] *Note*, Cases Moot on Appeal: *A Limit on the Judicial Power*, 103 U. Pa. L. Rev. 772 (1955); *Note, Moot Cases on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672, (1970).

[3] See Sidney A. Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125 (1946).

[4] Note, 103 U. Pa. L. Rev. 772.

omy." Similarly, issues of importance whose continuing future effects may be anticipated may well be more earnestly litigated by those, such as associations of potentially affected members, who foresee an impact on them of those future effects than by directly involved parties who may never see the problem again. That is, there is no inherently necessary connection between the existence of an unresolved dispute and a thorough and competent litigation of the issues.

How, then, should the determination be made as to whether a given case should engage the judicial process? Former Chief Justice Warren, in *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968), stated that justiciability is a concept designed to "limit the business of federal courts to questions presented in an adversary context and in a form capable of resolution through the judicial process." [5] This functional view of justiciability suggests that the conceptual problems involving application of the mootness limitation to the type of case here under consideration may best be resolved and consistency be achieved by analyzing justiciability in terms of the needs and objectives of the appellate judicial process rather than, for

---

[5] Justice Frankfurter, concurring in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 594 (1952) expressed a similar view in language which emphasized the amorphous quality of the concept.

> "Judicial power can be exercised only as to matters that were the traditional concern of the courts at Westminster, and only if they arise in ways that to the expert feel of lawyers constitute 'cases' or 'controversies.' Even as to questions that were the staple of judicial business, it is not for the courts to pass upon them unless they are indispensably involved in a conventional litigation. . . ."

What is the relationship between what may once have been "traditional" to what is now, in a vastly changed time, appropriate? How does one codify the "expert feel" of lawyers? And to the extent that the legal system adjusts to the needs of an ever more complex society, can the notion of "conventional litigation" remain constant?

example, in terms of the identity of those who seek to litigate the issues or whether a specific instance of a general and continuing controversy has been resolved by the parties.

Fundamentally, that appellate judicial process requires only that degree of adverseness of interest between litigants as will assure both the effective functioning of the adversary system and the effective resolution of issues of public importance. However, in making mootness determinations, courts have evolved a variety of theories which are in no way consonant with each other. We submit, with reference to the two requirements set forth above, that (1) clarity and uniformity in the application of the mootness doctrine can be accomplished without compromising the objectives and needs of sound judicial policy; and (2) the instant case is an appropriate vehicle for accomplishing this desired result.

II. Courts' Treatment of the Mootness Issue Has Been Inconsistent and Affords No Effective Guidance to Potential Litigants.

A. *The Differing Variables Employed by the Courts.*

In determining whether a case which involves an important and recurring question becomes "moot" when the immediate parties have adjusted their personal dispute prior to definitive judicial consideration of the issue presented, or when relief to the contending parties is otherwise inappropriate, courts have created inconsistent and artificial distinctions which have produced confusion where clarity is needed.

In *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953), one of the most often cited decisions in this area, the defendants in an anti-trust suit voluntarily ceased the conduct complained of prior to final judicial review. The "mere possibility" that the challenged conduct might again recur was held to be sufficient to insure the presentation and vigorous litigation of issues

necessary to proper adjudication and prevent the case from being "moot". This Court stated:

> "[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. . . . A controversy may remain to be settled in such circumstances, . . . e.g., a dispute over the legality of the challenged practices. . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion." (Citations and footnote omitted.)

This proposition had been stated previous to, as well as subsequent to, *Grant*.[6] But it has not, however, been uniformly applied nor does its expressed rationale explain other decided cases.

Grant, however, involved a *governmental* challenge to private conduct that had ceased prior to review, as did the authorities referred to in footnote 6, *supra*. The "mere possibility" of recurrence which precluded a finding of mootness there has not uniformly been applied to otherwise similar situations where it is *private* parties who challenge governmental conduct. Illustrative is *Oil Workers, Local 8-6* v. *Missouri*, 361 U.S. 363 (1960), the case upon which the lower court relied in finding the instant matter moot. In *Oil Workers*, a case brought by private parties, the State of Missouri seized certain struck facilities during emergency circumstances and enjoined any future strike. The Court there held that a repetition of that conduct was merely "speculative," and consequently held the case moot. But is there a difference between the "mere possibility" of recurrence and a "speculative" recurrence? It does seem clear that so long

---

[6] *Bakery Sales Drivers Union* v. *Wagshal*, 333 U.S. 437, 442 (1948); *NLRB* v. *Mexia Mills, Inc.*, 339 U.S. 563, 567 (1950); *NLRB* v. *Raytheon Co.*, 398 U.S. 25 (1970).

as one may speculate about recurrence,—i.e., it is not impossible,—then there is at least a "mere possibility" that the questioned conduct will be repeated. Curiously, in a subsequent case the same conduct involved in *Oil Workers* was repeated pursuant to the same alleged authority,[7] illustrating that even when a future similar injury to claimed interests is only "speculative" it remains "possible." In any event, it would appear that the same faint likelihood of recurrence which prevents a finding of mootness in suits brought by the government has resulted in findings of mootness in suits brought against the government by private parties.

The conceptual basis for this disparate treatment may result from an unstated assumption that a private party has an insufficient stake in a recurrence of conduct involved in his suit, conduct to which he might never again be subjected, to warrant reliance upon him to constitute an effective and interested litigant for the future. In cases such as *Grant*, on the other hand, where the government challenges private conduct in its law-enforcement function, the government's future adverse interest may be relied upon; that is, it will continue to enforce the same statute and rule in the same manner against future violators. According to this analysis, in suits brought by

---

[7] *Street Employees Div. 1287* v. *Missouri*, 374 U.S. 74 (1963); see, also, an earlier case, *Commercial Cable Co.* v. *Burleson*, 250 U.S. 360 (1919), which involved a seizure by the Postmaster General of the cable company's property during World War I. The possibility that a seizure might recur was held insufficient to afford the necessary personal stake. See, also, *A. L. Mechling Barge Lines* v. *United States*, 368 U.S. 324 (1961) where an ICC order was attacked because it was made without a supporting hearing or findings. The Commission promised that it would make findings in the future, but insisted it was not required to hold hearings. The case was held moot because the new practice of giving findings "*may* lead the Commission to provide for a hearing—at least under some circumstances." *Id.*, at 331. These cases, brought by *private parties* to protest government conduct, represent an avoidance or rejection of the "mere possibility" test.

private parties, the avoidance of mootness requires a greater likelihood of recurrence than "mere possibility". At least one student of this Court's opinions has so concluded.[8]

Unfortunately, this analysis explains only a portion of the relevant cases. Thus, in *Gray* v. *Sanders*, 372 U.S. 368 (1968), this Court expressly applied the "mere possibility" test articulated in *Grant* to a *private* challenge of governmental conduct. *Sanders* was a voter class action challenging a Georgia state statute governing primary elections. The election officials did not follow the statutory plan for the primary in question, and the election was held. In holding the case not moot, this court applied the *Grant* test. The meaning of that case is not entirely clear, however; while the terminology followed *Grant*, the certainty that the Georgia voters would be adversely affected by any return to the challenged plan would presumably also satisfy the impliedly more stringent *Oil Workers* criteria.

Adding to the difficulty of assessing the import of *Sanders* is the contention, according to the court below and at least one legal scholar,[9] that the explanation for the *Sanders* case lies, instead, in the fact that election cases constitute a separate sub-group for mootness purposes. Under that view the relevant variables to be examined in mootness cases has swelled: Is the Government involved? Who is the plaintiff? What is the degree of likelihood of recurrance of the challenged conduct (differing in effect depending upon who the plaintiff is)? And what kind of case is involved?

As the variables employed by courts proliferate, it can be seen that the area begins to take on a needless and

[8] This explanation for the described disparate treatment appears to be adopted in *Note*, 83 Harv. L. Rev. 1672 (1970).

[9] Note, 103 U. Pa. L. Rev. 772.

burdensome complexity. Moreover, this Court has never expressly held election cases to represent a separate class and an analysis of such cases yields no obvious answer. *Moore* v. *Ogilvie*, 394 U.S. 814 (1969) involved a private party's challenge to the validity of a statute whose provisions were interpreted by state authorities effectively to deprive the challenging party of an opportunity to run for elective office. By the time the case reached this Court the election had already taken place. Nonetheless the case was held not moot. This Court could not realistically say that the challenged conduct would with certainty affect the challenging party in the future. On the contrary, one could only "speculate" whether he would again run for elective office. Rather, the case was deemed non-moot because it involved an important public question which would affect *other* similar private parties in the future since the same governmental agency would presumably continue to interpret the same statute in the same manner. Either *Moore* is an illustration of a separate sub-group of mootness case or,—by avoiding reliance on the *Grant* and *Oil Workers* terminology and focusing instead on the likelihood of future injury to other then-unaffected private parties,—*Moore* effected a change in mootness law generally.

In contrast to *Moore*, which involved an inherently likely recurring effect of the challenged conduct on a group which might or might not include the plaintiff himself, this Court declined to review the merits of two other election cases, *Brockington* v. *Rhodes*, 396 U.S. 41 (1969), and *Hall* v. *Beals*, 396 U.S. 45 (1969). *Brockington* and *Hall* involved situations in which the complaining party sought to have his name placed on the ballot as a candidate for a particular election (*Brockington*), and sought to be permitted to vote in a particular election (*Hall*), but was prevented from doing so pursuant to the operation of a statute which had subse-

quently been amended. By the time these cases reached this Court, the statutory amendments had been effected and the specific elections involved had been conducted. These cases were held to be moot since a repetition of the kind of injuries complained of could not recur in view of the statutory amendments. That is, in practical terms, no conceivable interest of either the individual complaining party or any others similarly situated could possibly be infringed in a similar manner in the future.

Reading the *Moore*, *Brockington* and *Hall* cases together, one may well deduce that this Court has effected a departure from the various tests previously followed in *Grant*, *Oil Workers* and *Sanders* and now relies, in mootness cases presenting important public questions, on whether it is *possible* that certain challenged conduct will recur to the *private* plaintiff or the class of persons to which the plaintiff belongs. Conversely, the former cases may be read as merely creating an additional basis for deciding a case on its merits when the future jeopardy to that class is "inherently likely" even though the prospective jeopardy to the private plaintiff himself may be merely "speculative." Finally, one may read *Moore*, assuming again that it is not merely representative of a special sub-group of cases, to give more specific meaning to *Oil Workers* in defining the degree of likelihood of recurrance which avoids mootness when *private* parties bring suit.

Nor do these authorities and possibilities exhaust the variables which courts' decisions have relied upon in determining whether cases are moot. The various approaches discussed above, which are based on assessments of probability of future effect, are further confused when the challenged conduct is deemed "capable of repetition, yet evading review." In *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911), this Court employed the quoted language as a basis to uphold a *private* challenge

to governmental conduct where there was no certainty or even inherent likelihood—but only a "mere possibility" that the challenging party would again be subjected to an injury such as he was then challenging. Indeed, the Court's focus was not at all on the degree of predictable future jeopardy to the plaintiff but rather on the need of the judicial system for a resolution of a problem which would otherwise continue to escape judicial scrutiny. It should also be noted that to still another legal scholar the doctrine of *Southern Pacific* is said to be restricted to only those cases which involve self-perpetuating situations without regard to the identity or nature of the plaintiff and without regard to *his* specific problem.[10] In either event, *Southern Pacific* was concerned with the needs of the judicial system for means by which to resolve problems; it was not primarily concerned with any requirement to satisfy the criteria relied upon in the other mootness cases discussed *supra*.

The reasoning of *Southern Pacific* would also seem to underscore this Court's decision in *Sibron* v. *New York*, 392 U.S. 40 (1968). That was a criminal case in which a private challenge was mounted to an alleged improper police search. The Court's conclusion of non-mootness in that case could not be said to trace to a concern that the challenging party was "inherently likely" to be again affected by the same wrongful conduct or that the probability of such a recurrance was, as to him, more than "speculative." Rather, the Court was concerned that the substantive issues presented in the case had a great potential impact on others and, unless adjudicated, would continue to evade judicial review.

Whatever the difficulty of reconciling the latter two decisions with *Moore*, *Oil Workers* and the "mere possibility" test of *Grant*, the task is compounded by the view

---

[10] Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125 (1946).

of at least one commentator [11] that criminal cases such as *Sibron*, like election cases, constitute an independent area whose mootness rules may not be imported to the analysis or resolution of such issues in other areas of the law.

Coming now to the instant proceeding, the confusion present here represents in microcosm the problems of the entire area. The underlying substantive question is one of substantial public importance, involving the propriety of a State's payment of public welfare funds to striking employees. Since strikes and threats of strikes will continue to occur, States will therefore continue to make the challenged welfare payments and parties will continue to act on the basis of the assumption that such payments may be made should a strike be called,—all to the disruption of parties' continuing bargaining relationships,—therefore the problem will recur with certainty. While there is at least a "mere possibility" that the issue will again confront the immediate parties (*Grant*), there is an "inherent likelihood" (*Moore*) that the class of persons, i.e. employers, to which the *private* plaintiff belongs will be affected by a recurrance. Since the duration of a strike is unlikely to be sufficiently protracted to survive the appellate process, the question presented is short term in nature, "capable of repetition, yet evading review." (*Southern Pacific*). Yet the court below, relying on *Oil Workers*, dismissed the case as being moot because the specific strike which gave rise to the entire action has terminated.

While recognizing that the law of mootness has undergone substantial liberalization and that the instant case would not appear to be moot on the strength of recent decisions such as *Moore*, the court nonetheless held it moot on the premise that in *labor relations cases*, the discontinuance of the challenged conduct necessarily re-

---

[11] Note, 83 Harv. L. Rev., *supra*.

sults in mootness. Thus the court below seeks to segregate still another area from the mainstream of mootness law and create yet one more independent sub-group. Moreover, the court below would render the mootness law in labor cases unique in that it would be *only* in such cases that the discontinuance of the underlying dispute automatically rendered a matter moot irrespective of other variables employed in other cases or other areas of the law. *Oil Workers* cannot reasonably be read to warrant such a result; nothing in that case requires a distinction between the mootness rules in labor cases and those which are appropriate in any other category or type of case.

Accordingly, adding to the confusion of the superabundance of tests and variables which may be derived from prior decisions of the courts in mootness cases, the court below adds a further basis for legal distinction.

From the viewpoint at least of a potential litigant, this is a situation which invites clarification and the resulting adoption of simpler, more encompassing rules.

B. *Discussion of the Variables Courts Have Employed in Mootness Cases and an Alternative Proposal.*

The various approaches which courts have used to determine whether one has a sufficient interest in the resolution of an issue, as divorced from its particular factual context, to prevent a finding of mootness have yielded the described uncertainty. They afford no rational basis for determining whether a case will be fully, competently or vigorously litigated. There is no warrant in logic or sound policy for applying one test in election cases such as *Moore* or criminal cases such as *Sibron*, applying a wholly different test in labor disputes such as *Oil Workers*, a third test when the government challenges private action, and a fourth test when a private party acts as plaintiff. There is no assurance that the self-interest necessary to achieve vigorous litigation will obtain in one

type of case rather than another and the assessment of the plaintiff's *personal* stake in terms of probability of recurrence of challenged conduct does not explain the court's adjudication of issues of public importance,—all of which militates in favor of granting certiorari in order to produce a needed clarification.

This public interest aspect is inherent in *Southern Pacific*, *Moore* and *Sibron*. It forms the basis for courts' need to determine issues of compelling importance which might otherwise evade review. Thus, where the issues raised involve significant questions that ought to be resolved, the requirement of probability of effect has been adjusted to allow resolution. Further, a number of lower federal courts have apparently adopted a public interest exception where, even though a case would be otherwise moot, the issues are of sufficient importance that they compel judicial resolution.[12] If the issues raised in a case are sufficiently important that they affect a broad category of persons and are likely to recur, there is no sound basis for rejecting an appeal because the appellant is unable to demonstrate for a certainty that a recurrence will affect him.[13]

---

[12] See, e.g. *Friend* v. *United States*, 388 F. 2d 579, 581 (CADC, 1967); *Dyer* v. *SEC*, 266 F. 2d 33, 47 (CA 8), *cert. denied*, 361 U.S. 835 (1959); *Boggess* v. *Berry Corp.*, 233 F. 2d 389, 391 (CA 9, 1956); *contra*, *Campbell Soup Co.* v. *Martin*, 202 F. 2d 398, 399 (CA 5, 1953). While this Court has indicated the relevance of the public interest in mootness determination, see, e.g., *Grant*, *supra*; *Moore*, *supra*; *Sibron*, *supra*, it has not expressly relied on the "public interest" as the sole basis for determining the question of mootness. *Street Employees Div. 998* v. *Wisconsin Employment Relations Board*, 340 U.S. 416, 418 (1951).

[13] The "public interest" component of the mootness doctrine has had great appeal to commentators in this area:

> "Not easy to weight, [the public interest in an adjudication on the merits] has seemed to some courts so pressing . . . as to justify a decision on the merits despite the fact that the decision could have no substantial effect on the parties who

The nature of the "interest" which a plaintiff should be required to possess in an issue to overcome a suggestion of mootness when relief in his case is otherwise inappropriate should be determined without reference to the continuum of probability-of-future-effect which courts today use as a test. That is, whether a recurring issue should be resolved by the courts ought not to depend upon the need for courts to measure the shades of differences between situations where such recurrence is "speculative," or "merely possible," or "probable," or "inherently likely" or "certain." Rather, it should be recognized that since self-interest is the motive which insures the proper functioning of the adversary judicial process, the fact that the appellant seeks to expend the time, money and effort to prosecute an appeal constitutes adequate assurance that he will litigate the issues with vigor. His self-interest may be based upon his own appraisal of the probability that a recurrence of the conduct complained of will affect him adversely. Perhaps it may be based on an identity of interest with those similarly situated. In some instances it may reflect an association's efforts to protect its members' interest from future jeopardy.[14] In any event, recognition of this principle reflects the realities of much present day litigation chal-

---

originally raised the question and that its usefulness would, as a result, be largely confined to the creation of precedent." (Citations omitted.) (Note, *"Moot" Administrative Orders*, 53 Harv. L. Rev. 628, 630 (1940).

[14] That such associational participation on its members' behalf demonstrates an interest sufficient to overcome objections to the adverseness principle was apparently recognized by the First Circuit in *Grinnell* v. *Hackett*, —— F. 2d ——, 82 LRRM 2986 (1973), which involved the same underlying substantive issue as is presented by the instant case. In *Grinnell* the Chamber was allowed to intervene, and thus prevent mootness, because it represented "many other employers . . . , as to at least some of whom the issue is certain to recur." *Id.*, at 2989-90.

lenging governmental action and, rather than diminishing the quality of litigation, serves to enhance it.[15]

Recognition of the legal adequacy of the personal stake of an appellant who, for whatever reason, perceives a sufficient self-interest to warrant prosecuting an appeal, does not destroy the necessary adversity required for vigorous litigation. Where the issue is important and there is a possibility of recurrence of the disputed conduct, the government, as defender of its actions, has an equally sufficient interest in presenting a well-argued case as it does when it is functioning as prosecutor;[16] it is surely just as important that the government refrain from unlawful conduct as it is that private persons do so. Since any unlawful activity engaged in by the government in the administration of a public law is bound to affect a large class of people and thus raise important issues, vindication of the public interest by private parties should not depend on the uncertainty engendered by tests of relative probability of recurrence. An even-handed and consistent application of the *Grant* test to all plaintiffs in all areas of the law would accomplish this and would involve no greater risk to the adverseness principle that this Court is already assuming under that test in its current and arguably more restricted sphere.

---

[15] This interest has been recognized by Professor Jaffe in his argument that "ideological" plaintiffs who challenge governmental action merely as concerned citizens should be accorded standing. See, Jaffe, *The Citizen As Litigant In Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033 (1968).

[16] When the challenged conduct is engaged in by the government, it is more than likely to recur absent a judgment condemning it as unlawful. The possibility that the issue in question will recur insures that the government, as defender of its policies, is a recurrent litigant who will be aware of the impact that an adverse determination will have on its future activities. Its adverse interest is thus assured. See, e.g., *Carroll* v. *President & Commissioners of Princess Anne County*, 394 U.S. 175 (1968).

Although the mootness doctrine in "recurrence" cases is inconsistently and confusingly applied, there is one policy thread that runs throughout. In cases determined not to be moot, the real concern of the courts has seemed to be the avoidance of the potential for continuous litigation of the same issues when those issues affect large segments of the public. This concern is manifested in the cases as an expression of the "public interest". While cases which have been found not to be moot can be read to share this concern, there are other cases, however, which have been held moot (such as *Oil Workers, supra*) which would appear to have warranted a different result for these same reasons.

This concern for the resolution of issues of public interest resulted in a finding of "justiciability" in the first "recurrence" case, *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897). *Trans-Missouri*, the conceptual progenitor of *Grant, supra*, involved an anti-trust action in which the government sought dissolution and injunction. During the pendency of the appeal, the defendant voluntarily dissolved. The Court held the case not to be moot saying:

> "There mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the legality of the agreement itself for the carrying out of which the association is formed . . . ." *Id.*, at 308.

The defendants were enjoined from re-combining in the future. This is significant because the theory prevalent at the time was that mootness was a remedial concept, and where this Court could not render an effective decree, the matter was moot.[17] In *Trans-Missouri* there was nothing to enjoin since the defendants had ceased their allegedly unlawful combination, and the Court's

[17] See *Singer Mfg. Co.* v. *Wright*, 141 U.S. 696 (1891); *Ex Parte Baez*, 177 U.S. 378 (1900).

decree would have no effect. However, the Court was concerned with the possibility that the "defendants would, by a series of successive re-combinations and dissolutions, engage the government in continuous litigation so that the "rights of the public" in obtaining judicial resolution of the underlying issue would be thwarted. *Id.*, 305-6, 309-10.

Similarly, in *Southern Pacific, supra*, this Court emphasized the importance of judicial review to all carriers who might possibly be affected by the ICC's policy of promulgating short-term orders. And in more recent cases, this concern is more manifest. In *Sibron, supra* the Court expressly stated that it was concerned with ". . . the vital importance of keeping open the avenues of judicial review . . .", 392 U.S. at 52, and in *Moore, supra*, where the underlying issue required resolution because it reflected a ". . . continuing controversy in the federal-state area . . .", 394 U.S. at 681.

In fashioning a rule which may predictably be applied in cases raising a question of mootness, the policy determinations expressed in *Southern Pacific, Sibron*, and *Moore* should be superimposed upon this Court's requirement, as expressed in *Flast* v. *Cohen, supra*, that justiciability is intended to insure that

> ". . . the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the . . . challenge will be made in a form traditionally thought capable of judicial resolution." (at p. 106)

In short, it is posited here that the proper application of the mootness doctrine demands an examination of the following criteria in cases where the immediate parties to the proceeding have adjusted their dispute prior to judicial consideration of the case or specific relief is for any other reason then inappropriate:

1) Whether the issue is one of importance affecting broad segments of the public or a substantial class represented by the plaintiff;

2) Whether the issue is one which may recur; "mere possibility" of recurrance should be the only relevant measure of continuing probability of effect; and

3) Whether there exist some parties to the proceeding who are prepared to litigate the opposing merits of the issues in conformance with the *Flast* standards.

If these criteria are satisfied,—that is, the issue is worth deciding on its merits, may recur to jeopardize others' interests and will be earnestly litigated,—then courts should proceed to an adjudication of that issue. Restricted to these variables, the analysis of mootness cases will be freed from the current excess of tests and categories and will afford a measure of predictability without loss of courts' flexibility within the confines of these proposed criteria to make such judgments as appear appropriate in the case at hand. A particularly meritorious consequence of the adoption of the proposed rule will be to eliminate special tests for special subclasses of cases. There is no inherent necessity for treating labor relations cases differently than any others for purposes of determining mootness. The court below so held not because it was required by logic or policy to do so, but solely because it was thought that this Court's decision in *Oil Workers* compelled that result. Whether *Oil Workers* should be so interpreted warrants this Court's attention. Indeed, this is true irrespective of the advisability of refashioning or clarifying mootness rules generally. For the questions presented in labor relations cases are of no less major consequence than those presented in any other field, no less infrequently present Constitutional problems and balancing requirements between statutory and Constitutional rights, recur no more

infrequently than major issues in other areas, are no less prone to associational representation of members' interests and are no less earnestly pursued and litigated in the courts. On the contrary, arguments may well be advanced to demonstrate that in the often highly-charged atmosphere of labor relations the degree of parties' concern and need for the settlement of potentially difficult future questions is more intense than may be typical elsewhere.[18] But the establishment of that *a fortiori* position is unnecessary to the contention urged here that simpler, more generally applicable and more easily enforceable rules are needed to convert mootness to a manageable and more useful doctrine both in labor relations and elsewhere.

> "If the Court is confronted with a substantial likelihood that an issue it believes moot will always arrive there in the same condition because of the inherent nature of the issue, the Court should not refuse review on the basis of mootness. This policy overrides the first policy of ensuring the effective functioning of the adversary system, so demonstration of the litigants' personal stake should not be required. The Court must acknowledge that the real choice is not between taking or not taking risks with the quality of the judicial process, but between securing or not securing the values of appellate review—stability, uniformity, and objectivity." [19]

---

[18] The underlying substantive issue presented below has given rise to substantial recent litigation demonstrating its significance as an issue, its recurring quality and the willingness of those who are and who may be affected by such recurrence to litigate the matter. See, *e.g.*, *ITT* v. *Minter*, 435 F. 2d 989 (CA 1, 1970); *Grinnell* v. *Hackett*, *supra*; *Almacs* v. *Hackett*, 311 F. Supp. 964 (D.R.I., 1970); *Francis* v. *Davidson*, 340 F. Supp. 351 (D. Mich.), *aff'd. per curiam*, 409 U.S. 904 (1972); *Russo* v. *Kirby*, 453 F. 2d 548, (CA 7, 1971); *Dow Chemical Co.* v. *Taylor*, —— F. Supp. ——, 57 F.R.D. 105 (1972).

[19] Note, 83 Harv. L. Rev. 1672 at 1692 (1970).

III. There Exists An Irreconcilable Conflict Among the Circuits as Well as Between the Circuits and This Court's Decisions.

As has been previously noted herein, the court below, while conceding great doubt and inviting this Court's guidance, held the instant case moot because the union's strike had been discontinued prior to judicial consideration of the strike-related issue which gave rise to the suit. This result was said to be required by the fact that in labor relations cases the absence of a viable dispute rendered a case moot irrespective of the existence of other variables or criteria which would lead courts to hold otherwise in fields other than labor law.

At the outset, that view of the function of mootness in labor relations cases, though premised on the assumed holding of this Court in *Oil Workers*, is in conflict with a substantial number of cases also decided by this Court in the same labor field and in which a decision on the merits had been rendered although the challenged conduct had ceased long before. Among such decisions are *Bakery Sales Drivers Union* v. *Wagshal*, 333 U.S. 437, 442; *N.L.R.B.* v. *Mexia Mills, Inc.*, 339 U.S. 563, 567; *N.L.R.B.* v. *Raytheon Co.*, 398 U.S. 25; and *Local 1976, United Brotherhood of Carpenters and Joiners, et al.* v. *N.L.R.B.*, 357 U.S. 93. In the last cited case, for example, a union which had been charged with engaging in unlawful picketing had agreed to cease such conduct after the filing of those charges but prior to the issuance of any formal administrative Complaint. The union had, moreover, as part of its cessation of unlawful conduct, fully settled the case with the complaining employer and had executed a collective bargaining agreement containing an explicit pledge not to resume striking. To the contention that the case was moot this Court disagreed

and held ". . . the controversy was not rendered moot . . . we cannot say that there was no danger of continued violation."

Similarly, the Courts of Appeals have regularly adjudicated labor issues over objection that the parties' settlement of their dispute or the cessation for other reasons of the alleged improper conduct rendered the cases moot. Illustrative cases include *N.L.R.B.* v. *United Hatters, et al.*, 286 F. 2d 950 (CA 4, 1961):

> "Nor can we adopt the suggested dismissal of the petition as now presenting only an academic question inasmuch as the pickets have long since been withdrawn.";

N.L.R.B. v. *Local 182, IBT*, 314 F. 2d 53 (CA 2, 1963); *N.L.R.B.* v. *Plumbers Union of Nassau County, Local 457, et al.*, 299 F. 2d 497 (CA 2, 1962); *N.L.R.B.* v. *Globe Wernicke Systems Co.*, 336 F. 2d 589 (CA 6, 1964):

> "Abandonment of an unfair labor practice does not cause the controversy to become moot.";

N.L.R.B. v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109 (CA 7, 1963):

> "If the court makes no decision as to the Respondent's former conduct, it may then be repeated; hence a decision as to its legality will not be a futile exercise of jurisdiction."

The Third Circuit itself, in contrast to its decision herein, declined to hold a case moot on application for an injunction by the National Labor Relations Board despite prior full compliance with all aspects of the Board's remedial order. *N.L.R.B.* v. *Local 65, Carpenters Union*, 318 F. 2d 419 (CA 3, 1963). The latter case was one in which the *government* was the moving party. Lest it be assumed that this factor militates against the con-

clusion that the Third Circuit itself has rendered inconsistent decisions in this area, this Court's attention is directed to another Third Circuit opinion which was issued *subsequent* to the instant case and which involved two opposing *private* parties. In *Pittsburgh Newspaper Printing Pressmen's Union No. 9* v. *Pittsburgh Press Co. et al.*, —— F. 2d ——, 83 LRRM 2349 (decided May 29, 1973), that court held that the appellant-unions' appeal from the district court's denial of an injunction to restrain the employer's reduction of number of work shifts pending arbitration was *not* moot despite the fact that the parties' dispute had since been resolved through arbitration. The court held that ". . . this appeal is not moot because the issues involved are 'capable of repetition yet evading review' ". In its decision, the court failed to mention, much less distinguish, the instant case decided shortly before.

In order to highlight the conflict which afflicts this area, this Court is referred to still another Third Circuit decision in which the court held moot a *private* party's appeal of a district court's alleged improper limitation of its participatory rights under Section 10 (l) of the National Labor Relations Act. *Samoff* v. *IAM, Lodge No. 1*, 420 F. 2d 952 (CA 3, 1969). The court's decision holding the appeal to be moot was premised on the settlement of the dispute which gave rise to the proceedings in which the appellant wished to exercise a participatory role. *Samoff* would thus appear to be consistent with the decision below but inconsistent with a dissimilar panel's subsequent holding in *Pittsburgh Press.*

However, shortly after *Samoff* was decided the identical factual and legal situation arose in the Eighth Circuit. *Terminal Freight Cooperative Assn. et al.* v. *Solien*, 440 F. 2d 124 (CA 8, 1971). The Eighth Circuit reached a contrary result:

> "In [*Samoff*], the Third Circuit held the execution of a collective bargaining agreement mooted an appeal on a similar issue. We are not disposed to follow this holding as we think it is contrary to the teaching of the Supreme Court in *United States* v. *W. T. Grant Co.* . . ."

In further explication of its holding,—in a case brought by *private* parties protesting an alleged breach of rights guaranteed under the labor laws—the Eighth Circuit expressly relied on mootness doctrine which had arisen in non-labor areas in suits brought by the government:

> "We do not think this case is moot because the probability of repetition of unlawful secondary boycott activity by the Union in the instant case is sufficient to satisfy the "mere probability" test articulated in *United States* v. *W. T. Grant Co.* . . . . In our view, a case is justiciable 'if there is a probability that the challenging party will be affected should recurrence take place' . . .. We believe that the doctrine of mootness should not be used to perpetually frustrate review of issues of public importance arising in otherwise justiciable cases . . ." (Quoting Comment, 83 Harv. L. Rev. 1672, 1692)

In summary, there can be no serious argument with the proposition that the law regarding mootness, both in labor law cases as well as in other fields of law, is in serious disorder. There is authority supporting altogether inconsistent results and a demonstrable and irreconcilable conflict among the circuits themselves. The need to promote order and predictability is patent. This Court has achieved that end recently in another important area which had previously been in similar disaray,—the law of standing. *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150; *Barlow* v. *Collins*, 397 U.S. 159. A comparable effort,—sought even by the court below,—is warranted.

CONCLUSION

For the reasons stated above, in supplementation of those stated by the petitioner, it is urged that the petition for writ of certiorari herein be granted.

Respectfully submitted,

MILTON A. SMITH
General Counsel

OTTO F. WENZLER
Labor Relations Counsel,
Chamber of Commerce of the
United States of America,
1615 H Street, N.W.
Washington, D.C. 20006

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607

JERRY KRONENBERG
BOROVSKY, EHRLICH & KRONENBERG
120 South La Salle Street
Chicago, Illinois 60603

Of Counsel:

COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C.

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
FILED
NOV 26 1973
MICHAEL RODAK, JR., CLERK

No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; and A. ROBERT SCHAEVITZ

Petitioners

vs.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STRENG, Director of the Camden County, New Jersey Welfare Board; JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant: TEAMSTERS LOCAL UNION NO. 676, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Respondents

BRIEF FOR PETITIONERS

HERBERT G. KEENE, JR.
JAMES A. YOUNG
1300 Two Girard Plaza
Philadelphia, Pa. 19102

LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
111 West Washington Street
Chicago, Illinois 60602
Attorneys for Petitioners

Of Counsel:
STRADLEY, RONON, STEVENS & YOUNG
1300 Two Girard Plaza
Philadelphia, Pa. 19102

LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statutes Involved	3
Statement of the Case	4
Summary of Argument	7
Argument	9
I. The "Current Contours" of the Mootness Doctrine Permit Resolution of the Instant Controversy	9
A. The Evolution of the Mootness Doctrine	9
B. The Present Case Involves Both the Requisite Probability of Recurrence of the Dispute and Adverse Effect on Petitioners	11
C. The Instant Case Falls Within the Ambit of the Southern Pacific Doctrine	15
D. Oil Workers Is Inapposite	17
II. The New Jersey Policy of Providing Subsidies to Striking Employees Is an Impermissible Obstacle to the Accomplishment of Federal Labor Policy	19
A. Free Collective Bargaining Without Government Interference Is Essential to the Federal Labor Scheme	21
B. A State Interest Cannot Legitimize an Intrusion Upon Federal Law	23
C. Assuming Arguendo That the New Jersey Policy Is Not Prohibited as a Matter of Law, a Demonstration That Substantial Subsidies Are Available to Striking Employees Constitutes a Prima Facie Showing of an Impermissible Obstruction of Free Collective Bargaining	24
Conclusion	27

AUTHORITIES CITED

Cases

Abbott Laboratories v. Gardner, 387 U. S. 136 (1967) 15

Ablondi v. Board of Review, 8 N. J. Super 71 (App. Div. 1950) 22

A. F. L. v. Watson, 327 U. S. 582 (1946) 14

Aeronautical Lodge 727 v. Campbell, 337 U. S. 521 (1949) 14

Aetna Life Ins. Co. v. Haworth, 300 U. S. 227 (1937) .9, 10

Almac's, Inc. v. Hackett, 312 F. Supp. 964 (R. I. 1970) 14, 19

American Shipbuilding Co. v. N. L. R. B., 380 U. S. 300 (1965) 21

Atherton Mills v. Johnston, 259 U. S. 13 (1922) 12

Atlantic Richfield Co. v. Oil Chemical & A. Wk'rs., Int'l. Union, 447 F. 2d 945 (7th Cir. 1971) 12, 13

Avco Corp. v. Local 787, UAW, 459 F. 2d 968 (3rd Cir. 1972) 12, 13

Boys Market, Inc. v. Retail Clerks Union, Local 770, 398 U. S. 235 (1970) 14

Brockington v. Rhodes, 396 U. S. 41 (1969) 18

Cab Operating Corp. v. City of New York, 243 F. Supp. 550 (S. D. N. Y. 1965) 23

Carroll v. Commissioners of Princess Anne County, 393 U. S. 175 (1968) 16

Colorado Anti-Discrimination Commission v. Continental Airlines, 372 U. S. 714 (1963) 24

Commercial Cable Co. v. Burleson, 250 U. S. 360 (1969) 18

Committee to Free the Fort Dix 38 v. Collins, 429 F. 2d 807 (3rd Cir. 1970) 10

Cooper v. Pate, 378 U. S. 546 (1964) 5

Dandridge v. Williams, 397 U. S. 471 (1970) 19

Delaware Coach v. Public Service Commission, 265 F. Supp. 648 (Del. 1967) 23, 24, 25

Division 1287, Bus Employees v. Missouri, 374 U. S. 74 (1963) 14

Doremus v. Board of Ed., 342 U. S. 429 (1951) 12

Dow Chemical Company, The v. Taylor, ____ F. Supp. ____, 57 F. R. D. 105 (E. D. Mich., *pend.*) 19

Ex Parte Baez, 177 U. S. 378 (1900) 9

Fishgold v. Sullivan Dry Dock & Repair Corp., 328 U. S. 276 (1946) 14

Flast v. Cohen, 392 U. S. 83 (1968) 12

Florida Lime & Avocado Growers v. Paul, 373 U. S. 132 (1963) 24

Francis v. Davidson, 340 F. Supp. 351 (Md. 1972), *aff'd per curiam*, 404 U. S. 904 (1972)..... 19

Free v. Bland, 369 U. S. 663 (1962) 24

Gardner v. Toilet Goods Assoc., 387 U. S. 167 (1967) . 15

Garner v. Teamsters Union, 346 U. S. 485 (1953) 25

Gatling v. Butler, 52 F. R. D. 389 (D. Conn. 1971) 11

General Dynamics Corp. v. Local 5, Shipbuilders, 469 F. 2d 848 (1st Cir. 1972) 13

General Electric Company v. Callahan, 294 F. 2d 60 (1st Cir. 1960) 22, 26

Goldberg v. Kelly, 397 U. S. 254 (1970) 16

Grand Rapids City Coach Lines v. Howlett, 137 F. Supp. 667 (W. D. Mich., 1955) 22, 23, 26

Gray v. Sanders, 372 U. S. 368 (1963)..... 11

Great N. Ry. v. Sunburst Oil & Refining Co., 287 U. S. 358 (1932) 10

Grinnell Corporation v. Hackett, 475 F. 2d 449 (1st Cir. 1973), *cert. den.* 94 S. Ct. 164 (Oct. 9, 1973)..... .....9, 13, 15, 17, 19, 25

Hall v. Beals, 396 U. S. 45 (1969) 11

I. T. T. Lamp Division v. Minter, 435 F. 2d 989 (1st Cir., 1970), *cert. den.* 402 U. S. 933 (1971), *reh. den.* 404 U. S. 874 (1971).....4, 5, 16, 19, 20, 23, 25

John Hancock Mutual Life Insurance Co. v. Commissioner of Insurance, 349 Mass. 390, 208 N. E. 2d 516 (1965) 22, 23, 25

Kuhn v. Fairmont Coal Co., 215 U. S. 344 (1910) 10

Lascaris v. Wyman, ... N. Y. ..... (1973), *cert. den.* 94 S. Ct. 165 (Oct. 9, 1973)..... 19

Liner v. Jafco, 375 U. S. 301 (1964) 17

Linkletter v. Walker, 381 U. S. 668 (1965) 10

Local 1976, Carpenters v. N. L. R. B., 357 U. S. 93 (1958) 13

Local 24, International Brotherhood of Teamsters v. Oliver, 358 U. S. 283 (1959) 21

Matson Terminals, Inc. v. California Employment Commission, 24 Cal. 2d 695 (1944) 22

McDonnell-Douglas Corp. v. Green, ... U. S. ....., 36 L. Ed. 2d 668 (1973) 25

A. C. Mechling Barge Line v. U. S., 368 U. S. 324 (1961) 18

Moore v. Ogilvie, 394 U. S. 814 (1969) 11, 15, 16, 18

Motor Coach Employees v. Lockridge, 403 U. S. 274 (1971) 20

Motor Coach Employees v. Missouri, 374 U. S. 74 (1963) 24

Nash v. Florida Industrial Commission, 389 U. S. 235 (1967) 25

N. L. R. B. v. Exchange Parts Co., 375 U. S. 405 (1964) 26

N. L. R. B. v. Globe Wernicke Systems Company, 336 F. 2d 589 (6th Cir. 1964) 13

N. L. R. B. v. Granite State Joint Bd., 409 U. S. 213 (1972) 26

N. L. R. B. v. Insurance Agents' Int'l. Union, 361 U. S. 477 (1960) 14, 21

N. L. R. B. v. Local 825, Operating Engineers, 400 U. S. 297 (1970) 13

N. L. R. B. v. Marsh Supermarkets, Inc., 327 F. 2d 109 (7th Cir. 1963) 12, 13

N. L. R. B. v. Mexia Textile Mills, 339 U. S. 567 (1958) 13

N. L. R. B. v. Newark Morning Ledger, 120 F. 2d 262 (3rd Cir. 1941), *cert. den.* 314 U. S. 692 (1941)..... 14

N. L. R. B. v. Plumbers Union of Nassau County, Local 457, 299 F. 2d 497 (2nd Cir. 1962) 13

N. L. R. B. v. Raytheon Company, 398 U. S. 25 (1970) 13

N. L. R. B. v. Savair Mfg. Co., 470 F. 2d 305 (6th Cir. 1972), *cert. granted* 36 L. Ed. 2d 683 (1973)..... 26

N. L. R. B. v. United Hatters, 286 F. 2d 950 (4th Cir. 1961) 13

New York Telephone Company, et al. v. New York State Dept. of Labor, No. 73 Civ. 4557 (S. D. N. Y., *pend.*) 19

North Carolina v. Rice, 404 U. S. 244 (1971) 10

Oil, Chemical & Atomic Workers v. Arkansas Louisiana Gas Co., 332 F. 2d 64 (10th Cir., 1964) 22, 26

Oil Workers v. Missouri, 361 U. S. 363 (1960) 5, 9, 14, 17, 18

Pacific Maritime Association v. Int'l. Longshoremen's Union, 454 F. 2d 262 (9th Cir. 1971) 13, 16
Perez v. Campbell, 402 U. S. 637 (1971) 5, 23, 24
H. K. Porter Co. v. N. L. R. B., 397 U. S. 99 (1970).... 21
Powell v. McCormack, 395 U. S. 486 (1969)..... 18
Printing Pressmen's Union No. 9 v. Pittsburgh Press Company, 479 F. 2d 607 (1973) 13, 16
Roe v. Wade, ... U. S. ....., 35 L. Ed. 2d 147 (1973) 7, 13, 15, 16
Russo v. Kirby, 453 F. 2d 548 (2nd Cir. 1971) 19
San Diego Building Trades Council v. Garmon, 359 U. S. 236 (1959) 20, 24, 25
Sears, Roebuck and Co. v. Stiffel Co., 376 U. S. 225 (1964) 24
Sibron v. New York, 392 U. S. 40 (1968) 16
Sierra Club v. Morton, 405 U. S. 727 (1972) 12
Solien v. Miscell. Drivers & Helpers Union, Local No. 610, 440 F. 2d 124 (8th Cir. 1971) 10, 16
Southern Pacific Terminal Co. v. I. C. C., 219 U. S. 498 (1911) 5, 7, 9, 10, 16
Teamsters, Local 20 v. Morton, 377 U. S. 252 (1964).21, 25
Toilet Goods Assoc. v. Gardner, 387 U. S. 158 (1967)..14, 15
United States v. Concentrated Phosphate Export Ass'n., 393 U. S. 199 (1968) 11
United States v. Trans-Missouri Freight Association, Inc., 166 U. S. 290 (1897) 10
United States v. W. T. Grant Co., 345 U. S. 629 (1953) 12
Weber v. Anheuser-Busch, Inc., 348 U. S. 468 (1955) 24
Westinghouse Electric Corporation v. Board of Review, 25 N. J. 221 (1957) 22

Statutes and Regulations

38 Federal Regulations No. 1 (Jan. 3, 1973) 19

2 U. S. Code Congressional and Administrative News, 90th Cong. 1st Sess. (1967) 26

Miscellaneous

Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337 (1972) 20, 21

Daily Labor Report, No. 77 (April 2-20, 1973)..... 19

Davis, Ripeness of Governmental Action for Judicial Review, 68 Harv. L. Rev. 1122 (1955) 15

Frankfurter, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002 (1924) 10

Iowa Brief *Amicus Curiae* in *ITT Lamp Division* v. *Minter* 19

Massachusetts Brief in Opposition in *I. T. T. Lamp Division* v. *Minter*, supra..... 20

Note, Cases Moot on Appeal: A Limit on the Judicial Power, 103 U. Penn. L. Rev. 772 (1955) 10

Note, Mootness on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672 n. 22 .....10, 16

Thieblot and Cowin, Welfare and Strikes: The Use of Public Funds to Support Strikers, Industrial Research Unit, University of Pennsylvania Press (1972) 23

U. S. Department of Labor Statistics, Bureau of Labor Statistics, Work Stoppages in 1971 (Selected Final Tabulations) (June 1972) 12, 14

Wyoming Brief *Amicus Curiae* in *ITT Lamp Division* v. *Minter* 19